

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS JUNE 17, 2009

GARY WAYNE GARRETT v. GEORGE LITTLE, Commissioner, et al

**Direct Appeal from the Chancery Court for Davidson County
No. 07-1751-III Ellen Hobbs Lyle, Chancellor**

No. M2008-01867-COA-R3-CV - Filed August 7, 2009

This appeal involves an inmate's claim that he is entitled to various types of sentence credits that would reduce his sentences and affect his parole eligibility date. The trial court granted summary judgment to the Tennessee Department of Correction, finding that the inmate was not entitled to any additional sentence credits. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Gary Wayne Garrett, Nashville, TN, *pro se*

Robert E. Cooper, Sr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Kellena Baker, Assistant Attorney General, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

The petitioner, Gary Wayne Garrett, is an inmate in the custody of the Tennessee Department of Correction (“TDOC”). On October 10, 1986, Garrett was convicted of the following sixteen counts, for a total effective sentence of 119 years:

Count 1	Burglary - 1st degree	8 years
Count 2	Petit Larceny	2 years
Count 3	Aggravated Rape	30 years
Count 4	Aggravated Rape	30 years

(Counts 1-4 to be served concurrently, for a total of 30 years, but consecutive to all other counts)

Count 5	Burglary - 1st degree with possession of a firearm	11 years
Count 6	Aggravated Rape	30 years
Count 7	Aggravated Rape	30 years

(Counts 5-7 to be served concurrently, for a total of 30 years, but consecutive to all other counts)

Count 8	Burglary - 1st degree with possession of a firearm	11 years
Count 9	Assault with intent to commit rape while employing use of a firearm	5 years

(Counts 8-9 to be served concurrently, for a total of 11 years, but consecutive to all other counts)

Count 10	Burglary - 1st degree	8 years
Count 11	Rape	10 years
Count 12	Rape	10 years

(Counts 10-12 to be served concurrently, for a total of 10 years, but consecutive to all other counts)

Count 14	Burglary with possession of a firearm	11 years
Count 15	Aggravated Rape	30 years
Count 16	Aggravated Rape	30 years

(Counts 14-16 to be served concurrently, for a total of 30 years, but consecutive to all other counts)

Count 18	Attempt to commit a felony, to wit: Burglary - 1st degree, while employing use of a firearm	8 years
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(Counts 18, 8 years, to be served consecutive to all other counts)

The offenses were committed between June and September of 1985.

On May 12, 2005, Garrett submitted an inquiry to the Institutional Records Supervisor at the correctional complex where he was being held, seeking to have various sentence credits applied to his sentence and inquiring about custodial parole. A staff member of Sentence Management Services responded to Garrett's inquiry by informing him that he was not entitled to any additional sentence credits, and that he currently did not have any convictions that required a custodial parole hearing.

Garrett then filed a "Petition for Declaratory Order" with the Commissioner of the TDOC, seeking a declaration from the TDOC regarding an alleged "miscalculation of his prison sentences." Specifically, Garrett contended that he was entitled to 344 days of "pretrial jail credits," for time he spent in jail prior to his conviction, which he claimed should be applied to each of his six consecutive sentences. In addition, Garrett claimed that he was entitled to 6,510 days of "good conduct sentence credits" and 2,712 days of "prisoner performance sentence credits." Garrett acknowledged that he had signed a waiver in order to earn "prisoner sentence reduction credits" under a different program, but he asked that his waiver be rescinded *if* it was adversely affecting his sentence. Garrett argued that it would violate the ex post facto clauses of the United States and Tennessee Constitutions if the new sentence reduction credit law increased his punishment. Finally, Garrett claimed that he would have been on the parole docket but for the "misinterpretation of State law by department officials," and he requested that the TDOC provide the Board of Paroles with "the necessary certification." The TDOC subsequently denied Garrett's petition for a declaratory order, finding that he had been granted all appropriate credits to which he was entitled, and that his sentence structure was valid and correct.

Garrett then filed a petition in the Davidson County Chancery Court, seeking a review of the TDOC's denial of his petition for a declaratory order. He again asserted that he was entitled to 344 days of pretrial jail credit to be applied to each of his consecutive sentences, and he claimed that he was additionally entitled to 8,490 days of "good conduct sentence credits" and 2,784 days of "prisoner performance sentence credits." Garrett again claimed that denying him these credits violated the ex post facto clauses, and he further argued that the TDOC had acted illegally by denying him custodial parole. The TDOC filed a motion to dismiss and/or for summary judgment, along with the affidavit of the Director of Sentence Management Services, who provided detailed information regarding Garrett's sentences and credits according to TDOC records. The Director subsequently filed a supplemental affidavit with additional information. According to the Director's affidavits, Garrett had been awarded all the sentence credits to which he was entitled. The Director stated that Garrett's sentences were never eligible for "good conduct sentence credits" because he was sentenced under the Class X Felonies Act and the Reform Act of 1982. The Director also stated that although Garrett was initially eligible to earn "prisoner performance sentence credits," he had signed a waiver in 1986 opting to earn "prisoner sentence reduction credits" instead. Finally, the Director's affidavit indicated that Garrett would not become eligible for parole until 2011. Garrett then filed his own affidavit insisting that he was entitled to the claimed sentence credits. On July

15, 2008, the trial court entered an order granting summary judgment to the TDOC. Garrett timely filed a notice of appeal.

II. ISSUES PRESENTED

On appeal, Garrett presents the following issues for review, slightly restated:

1. Whether Garrett presented disputed factual issues concerning whether he received all the pretrial jail credits to which he was due.
2. Whether Garrett produced competent and material evidence demonstrating that he was entitled to earn “good conduct sentence credits” and “prisoner performance sentence credits.”
3. Whether Garrett presented disputed material facts demonstrating that the TDOC’s application of “prisoner sentence reduction credits” violates the ex post facto provisions of the United States and Tennessee Constitutions.
4. Whether Garrett presented disputed material facts demonstrating that the TDOC acted arbitrarily and/or in excess of its jurisdiction by reclassifying Garrett’s sentence and failing to notify the Board of Paroles that Garrett was eligible for parole as well as custodial parole.

For the following reasons, we affirm the decision of the chancery court.

III. STANDARD OF REVIEW

The resolution of a motion for summary judgment is a matter of law, which we review de novo with no presumption of correctness. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008).

IV. DISCUSSION

A. Pretrial Jail Credits

Garrett first argues on appeal that he was entitled to 344 days of pretrial jail credit to be applied to each of his consecutive sentences pursuant to Tennessee Code Annotated section 40-23-101. The affidavit submitted by the Director of Sentence Management Services indicates that Garrett was awarded pretrial jail credit from October 31, 1985, to the date of his sentencing, October 10, 1986, for a total of 344 days of pretrial jail credit. However, this 344-day credit was only applied to Garrett’s “lead sentence,” and he was not given additional 344-day credits toward his consecutive

sentences. Garrett does not take issue with the TDOC's calculation of his 344-day pretrial jail credit. He simply asserts that it should be credited against each of his consecutive sentences rather than the first sentence only.

Tennessee Code Annotated section 40-23-101(c) provides:

The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or juvenile court detention . . . or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

“The purpose of the pretrial jail credit statute is to treat those unable to make bail in much the same manner as those that are.” *State v. Watkins*, 972 S.W.2d 703, 705 (Tenn. Crim. App. 1998) (citing *State v. Abernathy*, 649 S.W.2d 285 (Tenn. Crim. App. 1983)). “The legislature in its wisdom recognized an injustice between the person of means who could make bond and the person who could not and had to languish in jail.” *Id.* (quoting *Abernathy*, 649 S.W.2d at 286).

We conclude that Garrett's pretrial jail credits were correctly applied to his first sentence and properly omitted from his consecutive sentences. “A defendant incarcerated prior to trial who receives consecutive sentences is only allowed pre-trial jail credits to be applied toward the first sentence.” *Rainer v. Mills*, No. W2004-02676-CCA-R3-HC, 2006 WL 156990, at *5 (Tenn. Crim. App. Jan. 20, 2006); *see also State v. Phillips*, No. W2005-00154-CCA-R3-CD, 2005 WL 3447706, at *1 n.1 (Tenn. Crim. App. Dec. 16, 2005); *State v. Davis*, No. E2000-02879-CCA-R3-CD, 2002 WL 340597, at *3 (Tenn. Crim. App. Mar. 4, 2002). The effect of consecutive awards of the full amount of pretrial jail credit would be to double the credit. *State v. Cleveland*, No. M2005-02783-CCA-R3-CD, 2006 WL 2682821, at *2 (Tenn. Crim. App. Sept. 14, 2006). “An inmate may not ‘double-dip’ for credits from a period of continuous confinement.” *Rainer*, 2006 WL 156990, at *5. For example, if we were to accept Garrett's argument that he was entitled to pretrial jail credits on each of his consecutive sentences, he would receive six days of jail credit for each day he spent in jail prior to his conviction.

On appeal, Garrett relies on *State v. Henry*, 946 S.W.2d 833, 834-35 (Tenn. Crim. App. 1997), which stated that “the dispositive issue is whether [the inmate] was committed and held in pretrial custody on both charges at the same time.” However, the Court in *Henry* was faced with determining whether pretrial jail credits should be applied to two sentences that were ordered to run *concurrently*. *Id.* at 834. As stated above, Garrett is not entitled to have pretrial jail credits applied to his *consecutive* sentences.

B. Good Conduct & Prisoner Performance Sentence Credits

For years now, “state prisoners in Tennessee have been able to reduce the length of their incarceration through the use of ‘sentence credits,’ which the prisoners must earn.” *Taylor v. Campbell*, No. M2001-00479-COA-R3-CV, 2003 WL 22248231, at *3 (Tenn. Ct. App. Oct. 1, 2003). However, the programs governing the availability of these credits have changed numerous times over the years. *Id.* (citing *Jones v. Reynolds*, No. 01A01-9510-CH-00484, 1997 WL 367661, at *3-4 (Tenn. Ct. App. July 2, 1997)). We will only discuss those credits relevant to Garrett’s claims on appeal – “good conduct sentence credits,” “prisoner performance sentence credits,” and “prisoner sentence reduction credits.” We will also discuss the Class X Felonies Act of 1979 and the Criminal Sentencing Reform Act of 1982 to the extent that they are relevant to his claims for credits.

Garrett was convicted of six counts of aggravated rape, which was, at the time, considered a Class X felony. Tenn. Code Ann. § 39-1-702(3) (1982) (repealed 1989). The Class X Felonies Act of 1979 was designed to provide swift and certain punishment for those who committed the most serious violent crimes. *Taylor*, 2003 WL 22248231, at *3. Initially, sentences for Class X felonies were not subject to reduction “for good, honor or incentive or other sentence credit of any sort.” Tenn. Code Ann. § 39-1-703(2) (1982) (repealed 1989).

TDOC records also indicate that Garrett was sentenced on all counts under the Criminal Sentencing Reform Act of 1982, the so-called “Judge Sentencing Act,” Tenn. Code Ann. § 40-35-101, *et seq.*, which provided:

Sentences for all felonies and misdemeanors shall be determinate in nature, and the defendant shall be responsible for the entire sentence undiminished by sentence credits of any sort except for credits authorized by § 40-23-101 relative to pre-trial jail credit or §§ 33-515 and 33-713 relative to mental examinations and treatment.

Tenn. Code Ann. § 40-35-211(1) (1982).

The “good conduct sentence credit” system went into effect on July 1, 1981, allowing prisoners to accrue “good conduct” time for proper behavior. *Allen v. Campbell*, No. M2001-00277-COA-R3-CV, 2002 WL 373246, at *2 (Tenn. Ct. App. Mar. 11, 2002); *Jones v. Reynolds*, No. 01A01-9510-CH-00484, 1997 WL 367661, at *3 (Tenn. Ct. App. July 2, 1997). Good conduct sentence credits were addressed in Tennessee Code Annotated section 41-21-229, which, by its terms, did “not apply to sentences imposed upon Class X offenders.” Tenn. Code Ann. § 41-21-229(d) (1982) (repealed 1985). In addition, TDOC policy 505.01 provided that “[i]nmates sentenced under Class X, Judge Sentencing, or the Sentencing Reform Act of 1989 are not eligible for Good Conduct Sentence Credits.” (TR p.176). Thus, Garrett was not entitled to earn good conduct sentence credits because he was sentenced under the Criminal Sentencing Reform Act of 1982. Furthermore, several of his sentences were imposed for Class X felonies and therefore ineligible for good conduct credit.

Another incentive program offered “prisoner performance sentence credits” pursuant to Tennessee Code Annotated section 41-21-230 (1982) (repealed 1985), which could be earned for participation in work, educational, and/or vocational training programs. In 1983, the General Assembly passed an amendment allowing certain Class X felons to earn prisoner performance sentence credits to reduce their sentence expiration dates, but not their parole eligibility dates. The amendment provided, in relevant part:

Notwithstanding the provisions of this chapter to the contrary, a person convicted of a Class X felony shall be eligible to receive prisoner performance sentence credits as provided in § 41-21-230 to reduce the expiration date of such person’s sentence. The provisions of this subsection shall not affect the release classification eligibility date¹ of Class X offenders.

Tenn. Code Ann. § 40-28-301(i) (Supp. 1983). TDOC policy 505.01 similarly provides that “[i]nmates serving Class X and Judge Sentencing sentences with offense date prior to December 11, 1985, may earn PPSC [prisoner performance sentence credits] to reduce only their expiration date(s) and may not reduce their expiration date in excess of their [release eligibility date]. PPSC does not reduce the [release eligibility date].” Therefore, Garrett would have been eligible to earn prisoner performance sentence credits to reduce the expiration date of his sentences, but he could not utilize the prisoner performance sentence credits to reduce his parole eligibility date.

In 1985, the General Assembly again amended the sentence credit statutes, establishing a new system of “prisoner sentence reduction credits.” The prisoner sentence reduction credits could reduce prisoners’ sentence expiration dates *and* their parole eligibility dates. *Taylor*, 2003 WL 22248231, at *4. The previous systems of sentence credits, including the good conduct sentence credits set forth in Tennessee Code Annotated section 41-21-229 and the prisoner performance sentence credits in section 41-21-230, were repealed. Acts 1985 (1st E.S.), ch.5, § 14. Inmates previously convicted of felonies, including those convicted of Class X felonies and those inmates sentenced pursuant to the Criminal Sentencing Reform Act of 1982, could begin earning prisoner sentence reduction credits as follows:

(c)(1) Any provision of chapter 35 of title 40 [the Criminal Sentencing Reform Act of 1982] to the contrary notwithstanding, persons convicted under that chapter may be awarded sentence reduction credits as set forth in this section.²

¹ A release eligibility date is the earliest date that a prisoner convicted of a felony may be eligible for parole. Tenn. Code Ann. § 40-35-501(m) (Supp. 2008).

² The aforementioned provision of the Criminal Sentencing Reform Act of 1982, Tenn. Code Ann. § 40-35-211, was amended as follows:

Sentences for all felonies and misdemeanors shall be determinate in nature, and the defendant shall be responsible for the entire sentence undiminished by sentence credits of any sort except for credits

(continued...)

....

(3) Any person who committed a felony, including any Class X felony, prior to the passage of this section may become eligible for the sentence reduction credits authorized by this section by signing a written waiver waiving his right to serve his sentence under the law in effect at the time his crime was committed. However, sentence reduction credits authorized by this section may be awarded only for conduct and/or performance from and after the date a person becomes eligible under this subsection.

Tenn. Code Ann. § 41-21-236(c) (1986). Credits already earned under the previous credit systems remained in effect. Tenn. Code Ann. § 41-21-236(f) (1986). In addition, those inmates who did not sign a written waiver as provided in subsection (c) could continue to earn credits under the previous credit systems. *Id.* Garrett signed a written waiver of his right to serve his sentences under the previous law on November 21, 1986, electing to earn prisoner sentence reduction credits instead.³

As stated earlier, the petition for a declaratory order that Garrett submitted to the TDOC requested that his waiver be rescinded *if* it was adversely affecting his sentence. Garrett argues on appeal that he would be entitled to 7,230 good conduct sentence credits and 3,828 prisoner performance sentence credits under the previous credit systems. We disagree. Regarding good conduct sentence credits, Garrett simply argues that he was entitled to such credits because ten of his sixteen convictions were not for Class X felonies. Regardless of this fact, Garrett fails to recognize that he was also sentenced pursuant to the Criminal Sentencing Reform Act of 1982, and therefore he was ineligible to earn good conduct sentence credits. *See* Tenn. Code Ann. § 40-35-211(1) (1982) (“Sentences for all felonies and misdemeanors shall be determinate in nature, and the defendant shall be responsible for the entire sentence undiminished by sentence credits of any sort except for credits authorized by § 40-23-101 relative to pre-trial jail credit or §§ 33-515 and 33-713 relative to mental examinations and treatment.”); TDOC policy 505.01 (“Inmates sentenced under Class X, Judge Sentencing, or the Sentencing Reform Act of 1989 are not eligible for Good Conduct Sentence Credits.”).⁴

²(...continued)

authorized by § 40-23-101 relative to pre-trial jail credit or §§ 33-5-306 and 33-7-102 relative to mental examinations and treatment, *and prisoner sentence reduction credits authorized by § 41-21-236.*

(emphasis on amendment).

³ According to TDOC records, Garrett signed the waiver opting to earn prisoner sentence reduction credits prior to earning any prisoner performance sentence credits under the previous credit system. Garrett does not dispute this fact on appeal.

⁴ The TDOC was authorized by statute to adopt rules and regulations regarding the administration of the good conduct and prisoner performance sentence credit systems:

(continued...)

As for the prisoner performance sentence credits, Garrett claims that he would have been entitled to 3,828 days under the old prisoner performance sentence credit system. From our review of the law, Garrett would have been eligible to earn prisoner performance sentence credits, even as a Class X felon, but the prisoner performance credits would only have reduced his sentence expiration dates, not his parole eligibility dates, at least for his Class X sentences. *See* Tenn. Code Ann. § 40-28-301(i) (Supp. 1983) (“[A] person convicted of a Class X felony shall be eligible to receive prisoner performance sentence credits as provided in § 41-21-230 to reduce the expiration date of such person’s sentence. The provisions of this subsection shall not affect the release classification eligibility date of Class X offenders.”); TDOC policy 505.01 (“Inmates serving Class X and Judge Sentencing sentences with offense date prior to December 11, 1985, may earn PPSC to reduce only their expiration date(s) and may not reduce their expiration date in excess of their [release eligibility date]. PPSC does not reduce the [release eligibility date].”). Moreover, even accepting Garrett’s calculations as true, he would only have earned 3,828 prisoner performance sentence credits to apply to his sentence expiration date. According to TDOC records, under the new prisoner sentence reduction credit system, which Garrett opted into by signing the waiver, he has earned 3,842 sentence credits. These credits would apply to both his sentence expiration date and his parole eligibility date. Therefore, in conclusion, it would not benefit Garrett to have his waiver rescinded and his sentence credits calculated according to the good conduct and prisoner performance credit systems,⁵ and the TDOC did not infringe upon Garrett’s rights by denying his request to rescind the waiver. *See Wilson v. Tenn. Dep’t of Corr.*, No. 01A01-9806-CH-00302, 1999 WL 652016, at *3 (Tenn. Ct. App. E.S. Aug. 27, 1999).

C. *Garrett’s Ex Post Facto Claim*

Next, Garrett argues that applying the system of prisoner sentence reduction credits to him would violate the ex post facto provisions of the United States Constitution because it retroactively reduces the amount of sentence credits he could earn. In short, Garrett claims that the prisoner

⁴ (...continued)

The department of correction shall adopt rules and regulations in accordance with the requirements of the Administrative Procedures Act, which designate the manner in which the sentence credit system established in §§ 41-21-229 and 41-21-230 shall be administered. The rules and regulations shall delineate the following:

....

(4) The effect of sentence credits upon the various types of sentences imposed; and

(5) The criteria for the earning of prisoner performance credits.

Tenn. Code Ann. § 41-21-233 (1982).

⁵ It is difficult to discern Garrett’s precise arguments on appeal, but to the extent that he claims he is entitled to prisoner sentence reduction credits *in addition to* prisoner performance and good conduct sentence credits, we reject his argument. *Brown v. Tenn. Dep’t of Corr.*, No. M1999-02519-COA-R3-CV, 2001 WL 177059, at *3 (Tenn. Ct. App. Feb. 23, 2001) (“Tenn. Code Ann. § 41-21-236 should not be read as providing that the inmate will be entitled to accrue sentence reduction credits under the new statutes in addition to accruing sentence credits under the prior enactment.”) (internal quotation omitted).

sentence reduction credit program “imposes a greater punishment after the commission of his offense(s).”

The United States Constitution provides that no state shall pass any ex post facto law. U.S. Const. art. I, § 10, cl.1. An ex post facto law contains two critical elements: (1) the law must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. *Henderson v. Lutche*, 938 S.W.2d 428, 430 (Tenn. Ct. App. 1996) (citing *State v. Ricci*, 914 S.W.2d 475, 480 (Tenn. 1996)). “Sentence reduction credit statutes in effect at the time of the commission of a crime are, as [Garrett] asserts, an inherent part of his sentence; consequently, application to him of a system of sentence credits which reduces the amount of credit he is eligible to receive, if such application effectively imposes a greater punishment at a date after the offense, is subject to constitutional attack.” *Allen v. Campbell*, M2001-00277-COA-R3-CV, 2002 WL 373246, at *4 (Tenn. Ct. App. Mar. 11, 2002). However, as stated in the previous section, Garrett was not disadvantaged by the application of the prisoner sentence reduction credit system. He has earned more credits under this system than he would have earned under the previous systems. Consequently, the legislature’s adoption of the new system to replace the one in effect at the time of his offense did not amount to an ex post facto violation. *See id.*

D. Custodial Parole

Finally, Garrett maintains that the TDOC “reclassified” his sentence and failed to notify the Board of Parole that he was eligible for custodial parole. Garrett insists that he was eligible for parole despite the TDOC’s position to the contrary. Although the basis of Garrett’s argument is not exactly clear, he relies upon the following two statutory provisions in claiming that the TDOC acted illegally:

Tenn. Code Ann. § 40-28-115(a) – Every person sentenced to an indeterminate sentence and confined in a state prison, after having served a period of time equal to the minimum sentence imposed by the court for the crime of which the person was convicted, shall be subject to the jurisdiction of the board.

Tenn. Code Ann. § 40-20-110(b)(1) – The department of correction shall notify the board of probation and parole when inmates sentenced to consecutive sentences which require custodial parole consideration reach parole eligibility on their initial sentences.

These sections have no application to determinate sentences, such as Garrett’s sentences.⁶ Section 40-28-115(a), by its terms, applies to persons “sentenced to an indeterminate sentence.” Section 40-20-110(b)(1) “applies only to prisoners who are serving two or more indeterminate sentences.”

⁶ A determinate sentence is a specific sentence with no minimum or maximum. *Howell v. State*, 569 S.W.2d 428, 430 (Tenn. 1978).

Washington v. Tenn. Dep't of Corr., No. M2002-02651-COA-R3-CV, 2005 WL 309359, at *3 (Tenn. Ct. App. Feb. 8, 2005)). Therefore, Garrett is not entitled to relief based on these statutes.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the chancery court. Costs of this appeal are taxed to the appellant, Gary Wayne Garrett, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.